UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| **OAKWOOD HEALTHCARE, INC.,**<br><br>**Employer,**<br><br>**And**<br><br>**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO**<br><br>**Petitioner** | Case 7-RC-22141 |
| **BEVERLY ENTERPRISES-MINNESOTA, INC., d/b/a GOLDEN CREST HEALTHCARE CENTER**<br><br>**Employer,**<br><br>**And**<br><br>**UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC**<br><br>**Petitioner** | Cases 18-RC-16415<br>18-RC-16416 |

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| **CROFT METALS, INC.,**<br><br>**Employer,**<br><br>**And**<br><br>**INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO**<br><br>**Petitioner** | Case 15-RC-8393 |

**AMICUS BRIEF ON BEHALF OF MASSACHUSETTS NURSES ASSOCIATION**

## I. Introduction

Pursuant to the NLRB's "Notice and Invitation to File Briefs" issued in the above-captioned matters, the amici Massachusetts Nurses Association ("MNA") submits the following arguments for consideration in the matters under review.

## II. Response To Questions

### A. Introduction

The MNA submits that the main task facing the Board in these matters is to construe the statutory term "independent judgment." It is central to the question of whether a given individual qualifies as a "supervisor" for purposes of the NLRA, since Congress has made plain

that an individual could regularly perform *each* of the listed supervisory tasks and still not be a "supervisor" *unless*, in the course of performing those supervisory tasks, she was required to exercise "independent judgment." A satisfactory definition of that term obviates, or at least places in a far more workable context, many if not all of the remaining listed questions surrounding the supervisory status inquiry.

### 1. The Term "Independent Judgment" As Used In Section 2(11) Of The Act Is Not Ambiguous; It Should Be Given its Plain and Ordinary Meaning

The MNA takes issue at the outset with the heretofore unchallenged notion that the statutory term "independent judgment" is ambiguous and thus needs to be construed by means of one or more ancillary tools of statutory construction.[1] Rather, the MNA suggests that Congress's intent can readily be determined by considering the words of the statute itself, i.e., "independent judgment," and giving them their plain and ordinary meaning. As best as the MNA can determine, neither the Board, the Supreme Court nor any federal Court of Appeals has ever undertaken

[1] "Whether the language of a statute is plain or ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'." Nat'l Fed'n of Fed. Emples., Local 1309 v. DOI, 526 U.S. 86, 101 (1998), quoting from *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "[A] statute is not ambiguous simply because litigants (or even an occasional court) question its interpretation." United States v. Ahlers, 305 F.3d 54, 62 (1st Cir. 2002)

any substantive inquiry into the meaning of the plain language of the statute to determine whether it is ambiguous.

In construing and applying statutory terms, courts begin by examining the language of the statute itself. See, e.g., Bailey v. United States, 516 U.S. 137, 144 (1995). They look at *all* of the words Congress has used. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). The first step in this process "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). See also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1984) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.")

Where the drafters of a statute have not defined the words in their statute, courts read those words to convey their ordinary meaning. Chapman v. United States, 500 U.S. 453, 462 (1991). See also Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); Sutherland, *Statutory Construction*, (4th Ed.) §§ 47.23, 47.28

(Words appearing in statutes are to be given their ordinary meaning). Courts frequently find the ordinary meaning of words by consulting dictionaries. Chapman, supra, 500 U.S. at 462. See also Moskal v. United States, 498 U.S. 103, 108 (1990).

As the First Circuit Court of Appeals has recently observed, "[t]he Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply [it] as it is written." Textron Inc. v. Comm'r, 336 F.3d 26, 31 (1st Cir. 2003). See also Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) ("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"); Rubin v. United States, 449 U.S. 424, 430 (1981) (when statutory language is plain and unambiguous, "judicial inquiry is complete, except in rare and exceptional circumstances."); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42 (1989) (plain meaning should be conclusive except in "'rare cases' [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters").

Congress did not define the term "independent judgment" in the NLRA. But both of the words that comprise that phrase have ordinary

meanings [indeed, meanings long established as of the time of the statute's enactment], which can be easily gleaned from their dictionary definitions.

Definitions of "independent" include the following:

- "free from the influence, control, or determination of another or others, specif., a) free from the rule of another, controlling or governing oneself; self-governing; b) free from influence, persuasion or bias; objective [an *independent* observer](Webster's New World Dictionary of the American Language, Second College Edition);

- "not subject to the control, influence or determination of another or others; not subordinate" (Webster's New Universal Unabridged Dictionary, Deluxe Second Edition);

- "not dependent; not subject to control, restriction, modification, or limitation from a given outside source" (Black's Law Dictionary, Fifth Edition);

- "being subject to control by none." Hermes Consol. v. United States, 14 Cl. Ct. 398, 406 (U.S. Claims Court, 1988) , citing Webster's New Collegiate Dictionary 584 (5th ed. 1977);

- "2. Free from the influence, guidance, or control of another or others; self-reliant." [American Heritage Dictionary];

- "not influenced or controlled by other people but free to make your own decisions" [Cambridge Dictionary of American English];

- "not depending on others for the formation of opinions or guidance of conduct; not influenced or biased by the opinions of others; thinking or acting . . . for oneself." [5 Oxford English Dictionary 200 (1933)]

- "Free from the influence, guidance, or control of others" [Roget's II: The New Thesaurus, Third Edition. 1995]

- A decision from 1947 [In re Hoaglund's Estate, 194 Misc. 803, 74 N.Y.S.2d 156 (1947)] observed that at that time, "the Merriam-Webster International defines [independent] thus: '1. Not dependent, as not subject to control by others; not subordinate; self-governing;

sovereign; free: . . . not relying on others; . . . irrespective of . . . another. 2. . . . 3. Separate; exclusive. 4. Not dependent for support or supplies.' The Practical Standard Dictionary defines it thus: '1. Not subordinate or subordinate or subject to nor dependent for support upon another government, person, or thing. . . . 4. Separate or disconnected'. The Merriam-Webster International gives the following synonyms for 'independent': 'Uncontrolled, uncoerced, self-reliant, unrestricted';

- A decision from 1934 [State ex rel. Patterson v. Schirmer, 129 Ohio St. 143, 194 N.E. 13 (1934)] notes that "[t]he word "independent" is defined by lexicographers as being free and uncontrolled by others."

"Judgment" has these relevant dictionary definitions:

- "1) the act of judging; deciding; . . . 7) the ability to come to opinions about things; power of comparing and deciding; understanding; good sense (Webster's New World Dictionary of the American Language, Second College Edition);

- "A sense of knowledge sufficient to comprehend nature of transaction. . . . the formation of an opinion or notion concerning some thing by exercising the mind upon it [Black's Law Dictionary, Fifth Edition]

- "[t]he ability to make decisions or to make good decisions, or the act of developing an opinion, esp. after careful thought" [Cambridge Dictionary of American English].

Applying the foregoing rules of construction to the statutory term "independent judgment" yields the following conclusions. First, by using the word "independent," Congress meant for that word to be operative. It must, in other words, be given meaning, and cannot be treated as if it was not present.

Second, the placement of the word "independent" before "judgment," shows that Congress intended for "independent" to *modify*

"judgment." [A modifier is "a word or phrase that limits the meaning of another word or phrase," see Webster's New World Dictionary of the American Language, Second College Edition at 914.] See, e.g., Campbell v. Merit Sys. Protection Bd., 27 F.3d 1560, 1568 (Fed. Cir. 1994)(placement of the word "independent" before "candidate" shows Congress intended the first word to modify the second).

Third, since Congress did not define the phrase "independent judgment," it must be assumed that Congress intended for it to be given its common, ordinary meaning. As shown above, both words *have* common, well-established meanings.

When the word "independent" is considered, and when it is used to modify "judgment," and when both words are afforded their common, ordinary meanings, the resulting phrase fairly carries this definition: a form of decision-making ["judgment"] in which the decision-maker, in reaching a decision on the matter presented to her, is free to make up her own mind and is not subject in any material way to the influence, control, or determination of another ["independent"]. Decision-making which is subject to the material influence, control or determination of another is simply the polar opposite of "independent" judgment.

The plain meaning of that phrase thus effectively limits the class of persons who would qualify as "supervisors" to those who operate with true decisional independence, a quantum of authority that is commonly

associated with those possessing managerial authority and it should be applied unless it is so contrary to what we know of congressional intent as to bring this within the scope of the limited exception to the plain meaning rule. But it is already known from the legislative record that the enacting Congress intended that the supervisory exemption was to apply only to those "vested with . . . genuine management prerogatives," S. REP. NO. 80-105, at 4. So it turns out that applying the plain meaning rule to the statutory phrase "independent judgment" gives effect to what Congress actually had in mind on this topic.

The MNA notes that this plain-meaning definition of the statutory term "independent judgment" is corroborated by considering the range of persons/positions that are vested with independent judgment and comparing the identified characteristics of that judgment. Included in this list are the following:

- Appellate court judges exercise "independent judgment" in regard to certain of their review responsibilities. The defining characteristic of this decisional authority is the absence of any responsibility to defer to the determination that is under review. See, e.g., Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984) (reviewing judges "must exercise independent judgment" when reviewing a trial court's determination of "actual malice").[2];

- All judicial officers exercising judicial power can be called on to exercise independent judgment: "the judicial power can mean the power of

[2] It is noteworthy that although they exercise independent judgment in this undertaking, their judgment is not itself final but rather is subject to review, both by full panels of their colleagues [en banc review] and the Supreme Court

independent judgment--the power to decide without having to give conclusive weight to the views of Congress or the President", "The Executive Power of Constitutional Interpretation", 81 Iowa L. Rev. 1267 (July 1996);

- Federal appellate courts also must in some instances *refrain* from exercising independent judgment, as when evaluating the sufficiency of the proof presented against a defendant in a criminal case, in which case they are bound to refrain from making independent judgments as to the credibility of witnesses [see, e.g., United States v. Franky-Ortiz, 230 F.3d 405 (1st Cir. 2000)]; or when assessing factual findings of the NLRB, see, e.g., Triplex Screw Co. v. NLRB, 117 F.2d 858 (6th Cir. 1941);

- Probation officers are vested with, and expected to exercise, independent judgment concerning the application of the criminal sentencing guidelines and should make their judgment known to the sentencing judge, even when their judgment differs from the view taken by the prosecuting United States attorney. See, e.g., United States v. Fraza, 106 F.3d 1050, 1055-56 (1st Cir. 1997);

- Attorneys are bound by their governing ethical rules to exercise "independent judgement", a constraint that prevents them from simply advocating whatever position a client demands. See, e.g., In re Ellis, 425 Mass. 332, 680 N.E.2d 1154 (1997). Indeed, it has been said in the context of insurance defense that "the control exerted over the purse strings is a recognized means of interfering with the independent judgment of defense counsel." Economics, Exigencies and Ethics: Whose Choice? Emerging Trends and Issues in Texas Insurance Defense Practice, 53 Baylor L. Rev. 349, (Spring 2001);

- It has been observed that state actors are to exercise their independent judgment in the face of requests from private citizens, and not "merely act as puppets." Tomaiolo v. Mallinoff, 281 F.3d 1 (1st Cir 2002);

- Certain elected state officials are charged with exercising independent judgment vis a vis the actions of other elected officials. See, e.g., Alliance, AFSCME/SEIU v. Commonwealth, 425 Mass. 534, 682 N.E.2d 607 (1997) ("[T]he Attorney General does not operate in a wholly subordinate role to the Governor, but may exercise independent judgment as to whether an executive action is so unlawful or against the interests of the public that he will not undertake to defend it in court, . . . ";

- Certain governmental officials are required to exercise their independent judgment vis a vis other officers within their department. See, e.g., Lawrence Lessig and Cass R. Sunstein, "The President and the Administration", 94 Colum. L. Rev. 1, (1994)(noting that the "Comptroller [of Treasury Department] clearly was expected to exercise independent judgment, since the safeguard of having him countersign the Secretary's warrants would be lost if he were wholly under the Secretary's direction".);

- Jurors are expected to exercise independent judgment even "in the face of pressure from the other jurors". United States v. Lemmerer, 277 F.3d 579 (1st Cir 2002);

- Directors of corporations are expected to exercise "their independent judgment among reasonable alternatives -- not to 'follow the crowd' . . .." Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds, 74 Geo. L.J. 12.

The application of the term "independent judgment" in those various contexts manifests a uniform theme of decision-making free from control by another entity.

The plain meaning of "independent judgment" as proffered by the MNA also matches in substance the definition given to the phrase "discretion and independent judgment" by the Department of Labor in 29 CFR 541.207, a regulation promulgated to implement exceptions to the overtime requirement contained in the Fair Labor Standards Act, 29 USC § 201 et seq. That regulation, entitled "Discretion and independent judgment," provides in relevant part as follows:

> (a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various

possibilities have been considered. *The term . . . implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.. . .*

(b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following: (1) *Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards*; and (2) *misapplication of the term to employees making decisions relating to matters of little consequence.*

c). Distinguished from skills and procedures: (1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. *An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment* within the meaning of § 541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

(emphasis added). The regulation further states that the term applies "to the kinds of decisions normally made by persons who formulate or participate in *the formulation of policy* within their spheres of responsibility *or who exercise authority within a wide range to commit their employer in substantial respects* financially or otherwise." 29 CFR 541.207(d)(2) (emphasis added). When that type of decision-making is applied to the peculiarly supervisory tasks enumerated in section 2(11), that level of

decisional authority sounds like the kind of authority possessed by one with true managerial prerogative.

The MNA submits the if the statute were so construed, the factual inquiry for the presence or absence of this decisional authority could include some of the following questions:

- is there evidence that the decision-maker is free from, or conversely, subject to, the influence, control, or determination of another in regard to the supervisory task at issue;
- is there evidence that the decision-maker can formulate the range of possible decisional outcomes, or must she instead pick from those delineated by another; stated differently, can she choose her choices, free from immediate direction or supervision;
- does the decision-maker formulate any policies in regard to the supervisory tasks she engages in;
- in making the decision concerning the supervisory task at issue, is she merely applying her skill and knowledge;
- is her range of choice limited by any professional standards or statutory requirements;
- must she tell anyone of her decision before implementing it;

- regarding the decision she is to make, are there in fact any viable alternatives, or is she simply implementing the only available choice;
- is she actually deciding anything, or merely coordinating an activity?
- must she give any weight to any prior determinations concerning the particular supervisory task she is performing; stated differently, is she writing on a clean slate.

## III. Summary And Conclusion

The MNA respectfully submits that the NLRB should take Congress at its word and recognize that it limited the supervisory class only to those who are required to exercise independent judgment – free, unconstrained decisional authority - when called upon to do one or more of the statutorily-enumerated supervisory tasks. Applying the plain meaning of that statutory term to the facts of the cases under review leads in all cases to the conclusion that the disputed individuals were *not*

supervisors because, as a matter of fact, their employers have not vested them with sufficient decisional freedom - true managerial prerogative - in regard to any of the listed supervisory tasks.

Respectfully submitted,

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